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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 100

ANDREW J. MAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

WARREN E. MAGEE,
DANIEL J. ANDERSEN,
Munsey Bldg.,
Washington, D. C.

OCTOBER 24, 1949.

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PETITION FOR REHEARING

Petitioner, Andrew J. May, respectfully prays that a rehearing be granted on his Petition for Writ of Certiorari in this cause, that his Petition be reconsidered and that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming (the Chief Justice dissenting) a verdict of guilty on three counts of an indictment (R. 159.)

Jurisdiction

Rule 33 of the Rules of this Court, as amended October 13, 1947, Section 2, provides for the filing of a petition for rehearing on orders on petitions for writs of certiorari.

This petition is timely filed under that rule. This Court has stayed its order in this cause pending the filing and determination of this Petition for Rehearing.

Brief Statement of Grounds

(I) Intervening circumstances of substantial or controlling effect have occurred since the filing of the Petition for Writ of Certiorari in this case and (II) other substantial grounds not fully and previously presented justify a rehearing and a reconsideration in this case.

I

Since the filing of our Petition this Court granted certiorari in *United States of America* v. *Fleischmann*, No. 98, October Term, 1949, and *United States of America* v. *Bryan*, No. 99, October Term, 1949, on petitions the Solicitor General. The Solicitor opposed our petition in this case.

The *Fleischmann* and *Bryan* cases involve the same statutes as are involved here. Particularly R. S. § 102, as amended, 2 U. S. C. 192 (Pet. 98, 99, pp. 2-3) (Pet. 100, p. 27). In answer to our contention that immunity must be given in exchange for testimony to Congressional Committees, the Solicitor General argued (Br. pp. 29-30) "There is no statute applicable to testimony before a Congressional committee * * * whereby self-incriminating testimony may be compelled * * *." Our attempt to "spell out" such immunity from 28 U. S. C. 634 and 2 U. S. C. 192 is characterized as "patently futile" (Br. pp. 29-30.) In other words the Solicitor General is saying that these statutes are unconstitutional and no testimony can be compelled. This means compulsion by subpoena and the threat of criminal contempt proceedings under the Solicitor General's argument cannot be had lawfully to compel the giving of testimony to Congress.

Now let us compare that position with the Solicitor General's position in the *Fleischmann* and *Bryan* cases. In those cases he cites R. S. 102, 2 U. S. C. 192, (Pet. 88, 89, pp. 2-3) under which respondents were convicted of criminal contempt, and seeks to uphold these convictions (which were reversed in the Court of Appeals). He does not confess error because 2 U. S. C. 192 is unconstitutional as he argued in our case, but argues that the construction of this statute "involves a novel and important aspect of committee procedure which should be settled by this Court." (Pet. 98, 99, p. 8.) In our case this statute, its constitutionality, its effect when witnesses testify, *even under subpoena, and after self-incrimination is claimed,* the Solicitor General argues does not "present any question requiring further review by this Court." (Br. p. 34.)

Yet to construe this statute and congressional committee action under it "as involving • • • and important *aspect* of congressional committee procedure" this Court granted certiorari in the *Fleischmann* and *Bryan* cases.

Hence we pose the question. If the construction of one aspect of the statute is so important as to warrant certiorari in cases Nos. 98 and 99 does not its more important and broader aspects, including *the constitutionality of this very statute,* and related ones, their administration by Congress and the Department of Justice also present sufficient grounds for certiorari? Is it to be said, that only the Solicitor General is entitled to certiorari involving these questions in cases *he has lost,* but that citizens convicted thereunder are not. We think not and therefore seek a rehearing and a reconsideration of our petition in this case. We submit a rehearing should be granted. (*Sanitary Refrigerator Co.* v. *Winters,* 291 U. S. 34, footnote 1).

II

Other substantial grounds available to petitioner have not been fully presented though mentioned (Reply Brief p. 13).

Congressional Committees are daily issuing subpoenaes to witness, calling witnesses and are seeking testimony from such witness. See *Fleischmann* and *Bryan* Petitions and Briefs. Also *Lawson* v. *United States,* No. 248; *Barsky* v. *United States,* No. 766; *Marshall* v. *United States,* No. 197; *Morford* v. *United States,* No. 236; *Trumbo* v. *United States,* No. 249; October Term, 1949, of this Court. These latter cases all seek certiorari under the statutes we have been considering.

We have always contended that these statutes to be constitutional must grant immunity from testimony given, before any witness can be compelled to give testimony to Congress. The United States in our case has contended no such immunity is given and a witness should just refuse to answer and take his chances on contempt charges.

But petitioner, Mr. May, and petitioner, Henry Garsson in case No. 102, when faced with these statutes, gave their testimony to the Senate Committee. They then were tried and convicted for substantive crimes about which they gave testimony. They believed that they gave that testimony to aid Congress in considering any necessary remedial legislation in exchange for immunity.

This question is inherent in all Congressional investigations, the issuance of summonses, the giving of testimony, and precedes quorum questions.

Now let us analyze the Solicitor General's "attitudes" on these vital questions of first impression. In our case no "exchange theory" was accepted. He argued that no one can be compelled to testify if the privilege is claimed (Br. 29-30).

Let us examine the Solicitors General's "attitude" in the *Lawson, Trumbo, Barsky, Marshall* and *Morford* cases now pending in this Court. In these cases the respondents appeared before a Congressional Committee, questions were put to them by the Committee. The respondents refused to produce certain records and answer certain questions. They stood on their "constitutional rights." The United States indicted and convicted respondents *under* R. S. 102, 2 U. S. C. 192, (our "unconstitutional statute") and now the Solicitor General is defending those convictions.

Let us examine briefly his arguments in cases *won* by the United States below. He states (Br. 236, p. 11):

"The Committee's power of inquiry, * * * was very broad, and the evidence sought came within the scope of the inquiry," He concludes the convictions below were valid and rested upon a valid statute and Resolution of Congress. His argument in these cases when coupled with his argument in the *Fleischmann* and *Bryan* cases, is "refusal * * * deprived Congress of pertinent information in aid of its legislative function." Hence those who refuse can be convicted of contempt. Is this not arguing that the statute is constitutional and witnesses can be compelled to testify and if they refuse they must go to jail? Is not this clear from his Brief in Nos. 248, 249, p. 18, where he states: Constitutional rights "are not absolute?" "They never have been thought to preclude compulsion to testify. The power to compel testimony for public purposes—legislative * * * is essential to the existence and operation of organized society." Contrast this with the Solicitor General's arguments in our case.

We submit our case presents problems involving "novel and important aspects of congressional committee procedure which should be settled by this Court." It now appears that the Solicitor General has *actually* advanced

this ground as a basis for certiorari under the same statute. As this Court granted certiorari on that ground we submit that certiorari should be granted here in the proper administration of Congressional procedure, criminal procedure and in the interests of fair play and justice. (*United States* v. *Fleischman*, No. 98 and *United States* v. *Bryan*, No. 99, October Term, 1949)

WHEREFORE, this petition having been duly considered it is respectfully prayed that this Petition for Rehearing be granted and our original Petition reconsidered and a Writ of Certiorari be granted to bring before this Court the divided decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

WARREN E. MAGEE,
DANIEL J. ANDERSEN,
Attorneys for Petitioner,
720 Munsey Building,
Washington, D. C.

October 24, 1949.

Certificate

Counsel for petitioner certifies that this Petition for Rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds specified in Rule 33, Section 2, of the Rules of this Court.

WARREN E. MAGEE,
Of Counsel for Petitioner.